No. 01-618

Supreme Court, U.S.
FILED
DEC 13 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* THE INTERNET ARCHIVE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

This brief *amicus curiae* in support of Petitioners is submitted by the Internet Archive ("The Archive") pursuant to Rule 37 of the Rules of this Court. The Archive urges that the Court grant the requested writ of certiorari and reverse the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

The Archive[2] is a public nonprofit that was founded to build an "Internet library," with the purpose of offering permanent access for researchers, historians, and scholars to historical collections in digital format. Founded in 1996 and located in the Presidio of San Francisco, California, the Archive receives data donations from a multitude of resources, including libraries, educational institutions, and private companies.

Libraries exist to preserve and provide access to society's cultural artifacts. To continue to foster education and scholarship in this era of digital technology, libraries must extend into the digital world. Libraries depend heavily on public domain materials to serve their mission of preservation and access. The Copyright Term Extension Act of 1998 ("CTEA")[3] frustrates the Archive's goals of preservation and universal access thereby denying the public its rightful access to public domain works.

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1. Letters from all parties consenting to the filing of this brief are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae, or their counsel, made a monetary contribution to the preparation or submission of this brief. Professor Lemley contributed to this brief in his personal capacity, and its contents should not be attributed to his employers. The Clinic is thankful for the help and guidance of Michael Levy Manager, Law Library Computing and Lecturer in Law and Kathleen Vanden Heuvel Deputy Director, Law Library and Lecturer in Law.

2. For more information on the Internet Archive, *see* http://www.archive.org/about/index.html.

3. Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827.

The Archive submits this brief to increase the Courts understanding of the true cost of the CTEA to our cultural heritage.

SUMMARY OF ARGUMENT

Digital technology promises to change the world. The little ones and zeros that travel from, to, and through the computers we use provide powerful opportunities, especially for storage and transmission of media. Before the advent of digital technology, the use and reuse of published works was subject to an entirely different reality. Jack Valenti, President of the Motion Picture Association of America once said: "A public domain work is an orphan. No one is responsible for its life . . . it becomes soiled and haggard . . ." JESSICA LITMAN, DIGITAL COPYRIGHT 77 (2001). Before digital technology, Valenti may have had an argument — one could argue that it was so expensive to store, reproduce, and distribute physical works that keeping them out of the public domain may have resulted in more availability than letting them in.

With digital technology, however, this argument can no longer stand. Indeed, even Valenti now agrees that digital technology possesses the capacity to makes flawless copies trivial and worldwide distribution instantaneous.[4] This ease of publishing and distributing means that material in the public domain is universally available. The public domain has assumed a central role in education in this country and around the world. Projects to digitize and give away millions of out-of-copyright books, movies, and music are now underway, funded by foundations, the government, and indeed corporations.[5] Yet the

4. "But, with the increased availability of broadband Internet access you can bring down a full-length motion picture in less than 15 minutes . . ." Press Release, Motion Picture Association of America, Valenti Warns The Dangers Of Internet Piracy Before Congressional Subcommittee (October 28, 1999), *available at* http://www.mpaa.org/jack/99/99_10_28a.htm.

5. Raj Reddy, *Infinite Memory and Bandwidth: Implications for Universal Access to Information* (April 6, 2001) *available at* http://www.cc.gatech.edu/external.affairs/anniversary/rajreddy.ppt.

projects are directly confronting the largest barrier to making our cultural heritage available to all — the repeated extension of copyright terms at the expense of the public domain.

The *Eldred* decision comes at a critical time for our culture and its artifacts. For the second time in history the collection of *all recorded information* is within our grasp.[6] Digital technology allows us the opportunity to build a "universal" library that dwarfs the collections of the Alexandria Library and even our modern Library of Congress. This library will expand our understanding of "public access." It will make information accessible in formats that uniquely support and promote creativity in the arts and sciences — allowing individuals to clip and sample millions of words, films, and music recordings with ease. At the same time digitization will greatly reduce the cost of preserving our cultural history and eliminate deterioration caused regularly through the physical handling of cultural artifacts. Through digitization, we can inexpensively open the full contents of this new library to the public, especially to those for whom access has been a half-kept promise — the distant, the deaf, and the blind. A universally accessible archive of print, audio, and visual materials is within our grasp.

In passing the CTEA, Congress deprives the public of this universally accessible library. Because the exclusive rights of copyright holders today include the rights to reproduce, distribute, perform, or display the copyrighted work or derivative works, providing access to a copyrighted work by posting it on the Internet invites accusations of copyright infringement. 17 U.S.C. § 501, *et seq*. Therefore, it is only works that have clearly fallen into the public domain that can safely be added to this universally accessible library. If the CTEA stands, it will prevent books, films, and other copyrighted works on the verge

6. LUCIANO CANFORA, THE VANISHED LIBRARY (1990) (discussing the history and politics of the great Greek Library of Alexandria); Brewster Kahle, Rick Prelinger, and Mary E. Jackson, *Public Access to Digital Material*, 7 D-LIB MAGAZINE (October 2001), *available at* http://www.dlib.org/dlib/october01/kahle/10kahle.html.

of entering the public domain from being successfully preserved in digital form, thereby denying the public this rich and fertile collection of our past.

In the sections that follow, we describe four specific areas where digital archives can revolutionize learning and creativity — greater access, preservation, economy, and extension of works — and demonstrate how the CTEA frustrates each to the detriment of the public interest. These four areas are not simply fringe benefits or surplusage residual from the creation of copyrighted works; they are the real benefit of the bargain that the public is entitled to enjoy and may ultimately prove more important to our nation's progress than access to copyrighted works during their limited term. Should this Court permit the D.C. Circuit's decision to stand, it will be turning its back on the intent of the Framers and this Court's consistent statements that copyright serves public as well as private purposes.

ARGUMENT

I. The Public Domain Is An Essential And Historical Part Of American Intellectual Property Law

"Copyright law is not an insurance policy for authors, but a carefully struck balance between the need to create incentives for authorship and the interests of society in the broad accessibility of ideas." *New York Times Co., Inc. v. Tasini*, 121 S. Ct. 2381, 2403 n.20 (2000) (Stevens, J., dissenting) (citing U.S. CONST., ART. I, § 8, cl. 8). "Authorial incentive comes at the expense of the equally important public interest." *Id.* In granting Congress the power to create copyrights, the Founding Fathers recognized that information and ideas were powerful yet ephemeral assets that required narrow and limited rights designed to promote American arts and sciences economically as well as culturally.

The Founders focused the rights of authors through several explicit Constitutional limitations on Congress' grant of power. First, the Constitution requires that works be original so that copyright owners cannot remove art and information from the public domain, declaring dominion over something they did not create. *Feist Publ'ns v. Rural Tel. Ser. Co.*, 499 U.S. 340 (1991); *Graham v. John Deere & Co.*, 383 U.S. 1 (1966). Second, works must promote the progress of the arts and sciences so the public receives value in return for each monopoly grant. *Trademark Cases*, 100 U.S. 82 (1879). Third, the First Amendment requires that copyright law permit certain "fair uses" of protected works to benefit society. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985) (subsequently codified at 17 U.S.C. § 107). Finally, the Constitution permits the grant of copyrights only for "limited times." U.S. CONST. ART. I, § 8, cl. 8. This last right guarantees that copyrights will eventually expire, and that the public will ultimately receive the right to use all works.

A healthy public domain is essential to a healthy intellectual property regime. In *Harper & Row*, this Court stated that "copyright is intended to increase and not to impede the harvest of knowledge." 471 U.S. at 545. To reap these benefits, the public must not only be permitted to make certain uses of works during the copyright term, but must also be free to make unfettered use of works through public consumption, study, and re-exposition after the copyrights expire. As the *Harper & Row* Court explained, copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, *and to allow the public access to the products of their genius after the limited period of exclusive control has expired.*" *Id.* at 546 (emphasis added). Thus, the promotion of public disclosure of information is equally as important in intellectual property policy as incentives for creation. *Graham*, 383 U.S. at 9 ("The patent monopoly was not designed to secure to the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare. . . ."); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517,

524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."); *Feist*, 499 U.S. at 349-50 (stating that the "primary objective of copyright" is to promote public welfare); *Stewart v. Abend*, 495 U.S. 207, 224, 224-25 (1990) (noting the Copyright Act's "balance between the artist's right to control the work . . . and the public's need for access"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (noting the "careful balance between public right and private monopoly to promote certain creative activity"); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the limited monopoly conferred by the Copyright Act "is intended to motivate creative activity of authors and inventors . . . and to allow the public access to the products of their genius after the limited period of exclusive control has expired"); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (noting that "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts"); *Goldstein v. California*, 412 U.S. 546, 559 (1973) (discussing Congress's ability to provide for the "free and unrestricted distribution of a writing" if required by the national interest); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of the authors."). Moreover, as new mediums of expression arrive and the number of works produced increases, promoting public use and access to works becomes increasingly important. *Sony*, 464 U.S. at 443 n.23 ("[S]ince copyright protection is not perpetual, the number of audiovisual works in the public domain necessarily increases each year.").

II. The CTEA Prevents Works That Have Reached The End Of Their Proper Copyright Term From Entering The Public Domain

The CTEA single-handedly deprives our schools, libraries, and children of the benefits that digital archives offer. Because of both the retroactive and prospective extensions of copyright in the CTEA, a robust public domain remains outside of our grasp.

When one asks the leading experts on digital archiving "what is the single most significant barrier to preserving our cultural heritage?" one uniform answer resounds: intellectual property concerns. PANEL ON DIGITAL LIBRARIES, PRESIDENT'S INFORMATION TECHNOLOGY ADVISORY COMMITTEE ("PITAC"), DIGITAL LIBRARIES: UNIVERSAL ACCESS TO HUMAN KNOWLEDGE 21 (2001), *available at http://www.ccic.gov/pubs/pitac/pitac-dl-9feb01.pdf*; MICHAEL LESK, PRACTICAL DIGITAL LIBRARIES 223 (1997) ("Issues related to intellectual property law are the most serious problems facing digital libraries."). Until works reach the end of their term, it is simply impossible for librarians and archivists to seek rights from millions of copyright owners and prepare the works for preservation and access. The future of digital archives depends on a predictable and reasonable limit to copyright terms. Without "limited times," millions of historical and cultural works will be unavailable to the majority of the public and will continue to disappear in their original form. The ultimate dedication of these works to the public domain will be the promise that never comes due.

Consider some statistics. In the year 1930 10,027 books were published.[7] In 2001, all but 174 of these titles are out of print.[8] While a copy or two may exist in a library or a used bookstore, the copyright holders are not making these titles available to the public. But for the CTEA, digital archives could inexpensively make the other 9,853 books published in 1930

7. AMERICAN LIBRARY ANNUAL AND BOOK TRADE ALMANAC FOR 1872-1957 ("ALMANAC").

8. BOOKS IN PRINT ONLINE ("BIP"), *available at* http://www.bowker.com.

available to the reading public starting in 2005. But for the CTEA, they would now be available to hundreds and thousands of schools, researchers, and families. But for the CTEA, they would now be at the fingertips of new authors and artists, available to assist in forging the next generation of great literary works. Yet because the CTEA still stands, we must continue to wait, perhaps eternally, while works disappear and opportunities vanish.

With digital archiving, the public would stand a far better chance of accessing these "rare" books than works still under copyright but no longer made available by the copyright holder. For example, the Frank Capra movie, "It's a Wonderful Life" lay gathering dust in a movie studio until in the early 1970's when it fell out of copyright and was aired by Public Broadcast Stations. It quickly became a Christmas tradition on many stations and for many families.[9] But for its fall into the public domain this classic film would not have reemerged in the 1970s. Indeed, under the CTEA no one with an interest in showing the film would have been able to do so until 2041.

On its face, the CTEA merely extends the copyright term by 20 years. However, the central issue here is not simply the additional 20 years; it is the congressional policy of perpetual copyright. Congress has already extended the term of copyright *eleven times* in the 20th Century alone. LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 197 (2001). There is no reason to believe this time will be the last. Rather, it is far more likely that Congress will be pressured in 2018 to add still more term to works whose copyrights would otherwise expire.

The public domain is an essential component of the copyright jurisprudence of this Court and the lower courts. However, in *Eldred v. Reno*, 239 F.3d 372 (D.C. 2001), the District of Columbia Court of Appeals completely ignored the role of the public domain in copyright law as set forth within

9. Roger Ebert, *It's A Wonderful Life*, THE CHICAGO SUN-TIMES, *available at* http:www.suntimes.com/ebert/greatmovies/wonderful_life.html.

Art. I, § 8, cl. 8 of the Constitution. The Court of Appeals stated that Congress would exceed its power under the Copyright Clause if it made copyright protection permanent. But then, with a wink and a nod, it gave Congress the go ahead to perpetually extend copyright protection as long as each "extension" comes with a date certain. In holding that the introductory language of the Copyright Clause fails to impose *any* substantive limit on congressional power, and that said power is immune from First Amendment scrutiny, the Court of Appeals reduced the public domain to an illusion — a field forever tilled but never sown.

Without some check on Congressional power, it is unlikely that any of the cultural and historical works from the first half of this century will *ever* enter the public domain. Limits must be found. This Court must require Congress to respect the limitations of "promoting" and "limited times" or the public will never experience the value that digital archiving offers.

III. Digital Archives Breathe New Life Into The Public Domain

In the modern world of publishing, the public domain presents a thriving and vibrant area of learning and creativity. Far from the moldering books and deteriorating dusty film canisters of previous decades, today's collections can be digitally stored, accessed and distributed. This new global decentralized platform revolutionizes access and use of public domain works.

A. Digital Archives Allow Us To Preserve Our Cultural Heritage

1. Copyright Owners Fail To Preserve The Vast Majority Of Creative Works For Public Access

Millions of copyrighted works are created every year. In comparison, the number of works actually maintained and available to the public is quite small. Today, the number of volumes available for purchase in the US is a tiny fraction of the volumes published in the United States.[10] Amazon.com,

10. For example, in 1910, 13,470 books were published in the United States. ALMANAC. In 2001, only *180* of these titles are available

(Cont'd)

the world's largest online seller of books, lists only 2.5 million titles total in its online catalogue.[11] Libraries and archives preserve some of the books no longer for sale. However, public access to literary works under a system of physical archiving is fiscally and spatially constrained. The combined archives of public research libraries in the United States hold approximately 600 million titles total, a small percentage of the world's published works over the last 200 years.[12]

Every year, thousands of books, movies and sound recordings also move out of circulation and only a small number are preserved in libraries and private collections. Moreover, every year, physical decay and accidental loss (not to mention limited shelf and storage space) reduce the number of books actually available. This diminution of available copies applies equally to movies and sound recordings. James H. Billington, Librarian of Congress in 1994, stated:

(Cont'd)
for purchase from any publisher worldwide. BIP. The numbers for other decade years are similar: 1920 (8422 published, 307 in print in 2001); 1930 (10,027 published, 174 in print); 1940 (11,328 published, 224 in print); 1950 (11,022 published, 431 in print). *Compare* ALMANAC *with* BIP. The number of published books has dramatically increased, e.g. 1984 (57,087), 1995 (65,288), 1996 (57,132). BIP, *supra*. Thus, the number eventually lost to the public because of excessive copyright terms will be even greater in years to come.

11. Paul Chan, *Amazon Rebounds on Holiday Cheer But Skeptics Abound*, SINGAPORE BUSINESS TIMES, December 3, 2001 at SS2.

12. U.S. Department of Education. National Center for Education Statistics. Academic Libraries in the United States: Fiscal Year 1998, NCES 2001-341, by Margaret W. Cahalan, Natalie M. Justh, Mathematica Policy Research, Inc. and Jeffrey W. Williams, Project Officer, National Center for Education Statistics, Washington, D.C.: 2001. Table 5A. (Total number of paper volumes: 878,906,177; Total number of paper titles: 495,724,813; Total number of microform units: 1,062,082,077; Total number of electronic titles: 3,473,225, Total number of audio-visual materials-units: 92,305,707).

> Of America's feature films of the 1920s fewer than 20% survive; and for the 1910s, the survival rate falls to half that. But what is even more alarming is that motion pictures, both old and new, face inevitable destruction — old films from nitrate deterioration and newer films from color fading and the "vinegar syndrome." Only by storing films in low-temperature and low-humidity environments can nature's decay processes be slowed. The majority of American films, from newsreels to avant-garde works, do not receive this type of care and are in critical need of preservation.[13]

Even if a work, after a lengthy but presumably finite term, enters the public domain, the public may never enjoy it if few or no physical copies remain.

Like the D.C. Circuit, the Archive believes that "preserving access to works that would otherwise disappear . . . 'promotes Progress'." *Eldred*, 239 F.3d at 380. But the data rather starkly demonstrate that copyright holders lack an adequate incentive to preserve works. Despite the supposed incentives copyright offers to authors and publishers, today much of our cultural heritage lies fallow, withheld from the public domain by bloated copyright terms, and removed from the stream of commerce because copyright holders reap little profit from them. The truth is that by the time even the pre-CTEA copyright term expires, few books, movies, or music are being published for profit. Most copyright owners let their works fall out of print, leaving them in literary limbo.[14] Moreover, many owners of works from

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13. Redefining Film Preservation: A National Plan Recommendations of the Librarian of Congress in consultation with the National Film Preservation Board, Library of Congress Washington, D.C. (August 1994), *available at* http://www.loc.gov/film/plan.html.

14. It is worthy of note that the rights afforded to copyright owners under 17 U.S.C. § 106 do not address maintenance of works. Therefore, it can be presumed that there are few if any incentives for copyright owners to preserve works. That responsibility has been, and should be, left to our public libraries and archives as guardians of the public domain.

95 years ago cannot easily be found, especially when the license is for small or non-profit projects.

The benefits of our entire cultural heritage are forestalled while copyright holders derive profit from a relatively small number of works. For some works, extending the period between their decline in profitability and their entry into the public domain is more than just a delay — it is abandonment. For works recorded on film and other less stable mediums, for example, the CTEA extension threatens to lock them up past the time when they can be truly preserved. If the CTEA stands, the public's share of the copyright bargain, in many instances, will literally blow away on a breeze. The only way to revive these works is to let them reach the natural end of their term so that they fall squarely into the public domain. Once there, digital libraries and archives can save these works for future generation's attention and adoration.

2. Digital Archives Preserve Copyrighted Works and Prevent Their Permanent Loss

Digital archives offer a solution to the problem of preservation.[15] Films, books, and sound recordings that enter the public domain can be archived quickly, efficiently and cost-effectively via digitization so that no further deterioration or loss will ever occur. Digitizing a film, a book, or a sound recording makes a perfect copy of the work and saves that copy on a computer-compatible medium, such as a hard drive or a CD-ROM. Once the first copy is made, further copies can be rendered as backups in order to prevent loss or accidental destruction. These copies can exist in multiple locations preventing a catastrophe such as the great fire in Alexandria from destroying our heritage.

Our culture is exploding off the printed page into film, video, and sound. The world produces between one and two exabytes (a billion, billion bytes) of information each year.[16]

15. Amicus Archive strongly believes that to the extent possible, works should be preserved in both physical and digital forms.

16. Peter Lyman and Hal R. Varian, *How Much Information*, Executive Summary (2000), *available at* http://www.sims.berkeley.edu/how-much-info.

Only a tiny percentage (0.003) of this creativity takes the form of a printed page.[17] The vast majority of this information takes the form of sound, images, and numeric data.[18] With each passing day it becomes increasingly important that our libraries have the ability to collect and store these formats. Without digital archiving, the increasing cost and diminishing opportunity to preserve these works will nullify our efforts to save them for future generations. Utilizing currently available digital technology, we can build comprehensive collections that capture media works in their most pristine forms and preserve them forever.

Librarians and archivists throughout history have been the stewards of our cultural history. The passage of the CTEA does not change authorial incentives in support of preservation. Instead, it keeps creative works from librarians and archivists who armed with new technology stand ready to preserve them *all*.

B. Digital Archives Promote Full Public Access To Our Cultural Heritage

Digital archives hold out the promise of universal access to our cultural heritage. Today's libraries provide free public access for some people to some of this heritage. However, any single physical library can contain only a small fraction of humanity's cultural artifacts[19] and primarily serves its proximate community. In contrast, the Internet — the dominant platform for access to digital archives — provides relatively unlimited low cost capacity to support both the archiving of, and universal access to, traditional printed works, as well as audio, video, and still images. Internet-based digital archives are the true embodiment of the public domain.

17. *Id.*

18. *Id.*

19. United States public libraries contain approximately 784,562,000 volumes. Department of Education. National Center for Education Statistics. *Public Libraries in the United States: Fiscal Year 1998*, NCES 2001-307, by Adrienne Chute, Elain Kroe, National Center for Education Statistics, Washington, D.C. 2001. Table 7.

As this Court explained in *Reno v. ACLU*, the Internet is comparable to "a vast library including millions of readily available and indexed publications." *Reno v. ACLU*, 117 S. Ct. 2329, 2335 (1997). The Internet "was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world." *ACLU v. Reno*, 929 F. Supp. 824, 836 (E.D. Pa. 1996) (finding of fact #34), *aff'd*, 117 S. Ct. 2329 (1997). Just as this platform has lifted so-called "public records" out of "practical obscurity" and provided the fodder for controversial new products and services, it offers the chance to bring the creative works housed in the stacks and files of our libraries and archives to the public on a scale that heretofore seemed unimaginable.

As mentioned above, millions of copyrighted works are created every year, yet, after 75 years, few remain in circulation. Most books are out-of-print; many movie reels and recordings are lost or damaged.[20] Yet, even where archives store the few remaining physical copies of works, they provide only limited access: limited by geography, time, and form. Only a small minority of the public has the time and resources to access the bulk of our cultural heritage. For a large segment of the public, especially those in rural and remote locations and those searching for material on a tight timetable, our cultural reserves are essentially out of reach.

For example, Prelinger Archives in New York and San Francisco maintains over 48,000 ephemeral films relating to American life, culture, and industry, many of which have important historical and cultural value. The public can access this physical archive, but only through two very limited means: (1) designated representatives for stock footage licensing, i.e. Archive Films and Getty Images and (2) "access events" such

20. *Supra*, notes 7-13 and accompanying text. *See also* Redefining Film Preservation, *supra* ("The key conclusion of Film Preservation 1993 is that motion pictures of all types are deteriorating faster than archives can preserve them. Film is a fragile medium, intended for brief commercial life. . . .").

as academic and scholarly screenings, research visits to the archives and the provision of videotape copies. Every time a physical copy of a film is viewed, the quality of its print suffers slightly. Thus, while Prelinger Archives serves as a fine example of physical preservation, its fixed locations and limits on simultaneous use of films impede full public access. And the analog nature of the film means that what public access can occur slowly consumes the very film that is being viewed.

Digital archiving, on the other hand, eliminates many of these barriers and makes our vast resources available to almost anyone who wishes to use them.[21] Information on the Internet while frequently stored in one geographic location is readily accessible to individual regardless of their location, or the hour of the day.

The power of digital archives is demonstrable. The Archive recently borrowed 1,001 key public domain archival films from Prelinger, films that were found to be most in demand, plus unknown films that experience suggested people would want to work with and see. These films were transferred to videotape and then digitized so they could be stored and served online at *http://www.moviearchive.org*. In September and October 2001 alone, these movie files were downloaded over 1 million times from moviearchive.org, with many of these downloads performed by users from educational institutions some distance from New York or San Francisco. By contrast, in the entire year 2000, the public only accessed approximately 2,000 physical film clips through Prelinger's designated representatives and held approximately 200 physical access events. In other words, by removing the barriers of time and distance digital access allowed the public to view Prelinger's films over 2,700 times more often than physical access.

Digital archives can bring the public domain into schools, libraries, and homes across the globe. Indeed, for most works, it is *only* digital archives that can do so.

21. Panel on Digital Libraries, President's Information Technology Advisory Committee ("PITAC"), Digital Libraries: Universal Access to Human Knowledge 21 (2001) page 2, *available at http://www.ccic.gov/pubs/pitac/pitac-dl-9feb01.pdf*.

C. Digital Archives Support Rich And Diverse Use Of Our Cultural Heritage

Digital archives foster new and innovative use of works in the public domain. For the Prelinger collection, transition to digital format brought not only quantitative, but also qualitative changes in patron access. The Director of Prelinger Archives stated that the dramatic increase in access through moviearchive.org represents many different kinds of access, many of which were previously impossible. Such accesses include public screenings, classroom screenings, individual scholarly research projects, and low-budget productions.[22] Very few if any of these users would have been able to access the archives previously, according to Prelinger.

Digital archives offer academics and cultural inquisitors more than simple access to previously unavailable works; they also offer the opportunity to exploit highly efficient and productive search tools. For example, the Library of Congress ("LOC") preserves a collection of nearly 121 million items, more than two-thirds of which are in media other than books. These include the largest map, film and television collections in the world. It would take days if not weeks for most people to physically search through even the index to its collection, assuming one was able to make the trip to our nation's capital. Yet, now, with access to a computer, web browser, and the Internet, one can simply go to www.loc.gov and search their catalogue within minutes.

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22. Issues of accessibility are particularly important in education. Students, researchers, and teachers are constantly looking for material to use in their presentations, projects, and assignments. Where better to turn then a well-organized digital archive of works that represent our history? The older the work, the more valuable an educational tool it is. Consider, for example, the works of Shakespeare. Any copyright on his works would have long passed; now they are among the most abundant sources of inspiration and insight in modern education (next to the Bible, another work that has been rescued and preserved within the public domain).

Yet often searching the LOC catalogue is insufficient. Many answers within an item lie beyond its title, author or abstract, especially for media other than books. Imagine, however, if one could search the actual *contents* of the LOC collection, i.e. the words on the pages, the images on the films, or the sounds on the recordings, from one's home, school, or office computer. Such technologies are either currently available or quickly developing. For example, products such as Adobe Acrobat have the capacity to perform Optical Character Recognition ("OCR"), a process by which the program will take a digitized document, identify every word on each page of the document, and then allow the user to search the pages of the document for each and every occurrence of a word requested.[23]

Imagine now if 100 libraries around the country had a collection of a similar size to that of the LOC. Imagine that any child, student, philosopher, reporter, or scholar could simply go to any one of these 100 sites from his or her home or work computer, search for documents in the public domain, and then search and view those documents within a matter of minutes. Imagine that those who are blind or deaf can use tools that translate these works into a format that meets their needs. Further, imagine that individuals in other countries have the tools to translate these works into their native tongue in real-time. Think of the difference it could make in bringing our cultural heritage to the public and educating the populace. Where technology and imagination lead us the CTEA forbids us to go. For our children, high quality access to digital information demands a robust public domain.

D. Digital Archives Extend Our Cultural Heritage

Beyond preservation and accessibility digital archives provide the public with unprecedented opportunities to use our cultural heritage as the creative basis for the next generation of artistic and informative works. The ability to digitize vastly increases the capacity to incorporate our history and culture into new works.

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23. For more information on OCR Technology, *see* http://www.adobe.com/products/acrcapture/fullfeature.html.

Having access to digital copies of works allows new authors to maximize and extend the value of preserving our past publications. Unlike physical media, digital media allows the average individual to easily quote and cite movies, by clipping and sampling. Such quotation and citation not only augment the quality of scholarly work but also reintroduce older works into the present-today popular consciousness.[24]

This ability is made more important — and more powerful — as audio and visual recordings flourish. One can allude to or reference a printed work by quoting a short passage or citing to the publication. Visual and auditory media, however, present a far more complex arena for allusion and citation. If one wishes to reference a visual image, it is often necessary, if not essential, to show that image within one's own work. A slideshow cannot "cite" or "quote" a photo from a rally; a song cannot "cite" or "quote" a speech by a political candidate. Digital archives allow written, audio and visual works to be easily sampled and "cited."

Recently, the Archive held a filmmaking contest.[25] It asked amateur filmmakers around the world to create a short film of less than 10 minutes showing a perspective on an historical event associated with war. The films could be true stories, parodies or fiction. In creating these films, the Archive asked filmmakers to limit their resources to free content found in archives across the Internet, including the 1,001 films of the Prelinger Archive stored at moviearchive.org. The submissions each incorporated a powerful message about war and our society. These new creative works were built exclusively through the use and reuse of public domain digitized film.[26] Submissions came in from a fifth grade class in a District of Columbia public school and an individual in Finland. Such commentary, from such creators,

24. Businesses recognize the value of their corporate heritage for developing their message and image today. They too are creating digital archives of their creative works. *See* Allison Fass, *Online Archive for Coke Advertising*, N.Y. TIMES, December 10, 2001.

25. http://ftp.archive.org/html/contest01/contest.htm

26. To view the winning film as well as the other submissions, *see* http://ftp.archive.org/html/contest01/gallery.htm

would not have been possible without the advent of digital film archiving.

E. Digital Archives Make Preservation and Access More Economical

Digital archiving is not free. Nor is it even inexpensive. Yet because we only need a single digital copy of a work to preserve it in perfect condition for a virtually unlimited duration and for universal use, digital archives make preservation and enhanced access realistic and cost effective.

For example, the costs for physically preserving a single color feature film by copying can run to $40,000 or more, and the short lifespans once thought to be a problem only for nitrate now confront nearly all films.[27] By contrast, the entire cost of digitizing a film is $200 per hour of footage.[28] It is a single fee, paid once per film per lifetime. Once digitized, the cost of storing, maintaining, transmitting and making back up copies of the film approaches zero.[29] Digital files can be maintained, transferred, and backed up automatically by current software without human intervention. Digital archives will cheaply and efficiently save millions of works from dereliction and destruction.

But the return on digital archiving is higher still. Federal and state governments continue to spend taxpayer funds to "wire" our schools, libraries, and community centers — to connect them to the Internet.[30] As a nation we have made a

27. http://www.loc.gov/film/plan.html, § 3, ¶ 3.

28. Experience of Internet Archive, interview with Brewster Kahle.

29. The cost estimates for maintaining a digital book range from Michael Lesk's low of $4 to the National Archives and Records Administration (NARA) estimate of $13.99 to Yale University's estimate of $15.37 to the EPA's estimate of $250 per book. *See* Digital to Microfilm Conversion, *Table 6: Estimates for Archiving a Digital Book for 10 years, available at* http://www.library.cornell.edu/preservation/publications.html.

30. For example, the Universal Service Fund for Schools and Libraries-commonly known as the "E-Rate" program created in 1996 as part of Public Law 104-104, the Telecommunications Act of 1996, (Cont'd)

commitment to provide a broad swathe of the public with access to this new platform for communication, research, and publishing. But to what have we provided access to? If the CTEA stands it will not be the wealth of information and knowledge housed in our cultural institutions. For the rest of this century the public's treasures will remain offline and out of reach. We will have given our children the keys to this library, but they will enter only to find empty shelves.

CONCLUSION

Digital archives constitute the difference between a nominal public domain and a real, robust public domain. Their creation depends on "limited times." Digital archives are ready to serve the needs of children, researchers, and the public. But they will never get that chance unless Congress is prevented from making copyright protection perpetual. Amicus Internet Archive respectfully requests this Court to grant certiorari in this case and thereafter enforce the public's right to preserve its heritage by striking down the CTEA as an unconstitutional extension of the copyright term beyond the enumerated powers given to Congress by the United States Constitution.

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(Cont'd)
provides discounts on the cost of telecommunications services, including Internet access, and equipment to all public and private schools and libraries.

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